Supreme Court, U.S.
FILED
JUL 13 2009
OFFICE OF THE CLERK

(4)

No. 08-1291

In The
Supreme Court of the United States

ODIS TUCKER, VONNIE TUCKER,
and BLAKE TUCKER,

Petitioners,

v.

HARDIN COUNTY, a political subdivision of State of Tennessee, SAVANNAH POLICE DEPARTMENT,

Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

PETITIONERS' REPLY BRIEF

WILLIAM J. BROWN
(TENN. BPR# 5450)
Counsel of Record
WILLIAM J. BROWN & ASSOCIATES
23 N. OCOEE, P.O. BOX 1001
CLEVELAND, TN 37364-1001
PH: (423) 476-4515

Counsel for Petitioners

July 13, 2009

Becker Gallagher · Cincinnati, OH · Washington, D.C. · 800.890.5001

TABLE OF CONTENTS

TABLE OF AUTHORITIES ii

I. Introduction 1

II. Petitioners Have Not Waived Their Claims of Discrimination 1

III. Respondents Improperly Argue the Merits of Their Defense as Justification for Denying the Petition 5

(a) Respondents assertion that the circuit courts factual conclusion that the proffered accommodations were effective is the legal question that is presented by petitioners. . . 5

(b) The circuits are in serious conflict as to the legal issues before the court in this case. 8

CONCLUSION 9

TABLE OF AUTHORITIES

CASES

Anderson v. Liberty Lobby, Inc.,
477 U.S. 242 (1986) 4, 6

Chisolm v. McManimon,
275 F.3d 315 (3d Cir. 2001) 7

Duffy v. Riveland,
98 F.3d 447 (9th Cir. 1996) 7

Randolph v. Rodgers,
170 F.3d 850 (8th Cir. 1999) 7

Tucker v. Hardin County, et al,
539 F.3d 526 (6th Cir. 2008) 3, 4

STATUTES and RULES

42 U.S.C. §12132 ..... 1, 6

28 C.F.R. §35.130(b)(iii) 6

28 C.F.R. §35.160 6

Sup. Ct. R. 10(a) 5

Fed. R. Civ. P. 56(c) 6

PETITIONERS RESPONSE TO CITY OF SAVANNAH AND HARDIN COUNTY, TENNESSEE'S BRIEF IN OPPOSITION TO PETITION FOR CERTIORARI

I. Introduction

Both of the respondents in this case have raised similar issues associated with their argument that this court should deny the Petitioners application. The first issue is that the petitioners have waived their claims by failing to raise them in the court of appeals. The second issue is primarily associated with the "merits" with respondents arguing that the court of appeals was right in its decision to dismiss petitioners claims because of its determination that the proffered aids were effective was a correct finding of fact. As will be demonstrated hereinafter, the respondents fail to present arguments that are relevant to this courts considerations in granting a petition for certiorari.

II. Petitioners Have Not Waived Their Claims of Discrimination

Both respondents suggest that the petitioners have waived their claims of discrimination by failing to raise the question of whether proof of "intentional discrimination" is required to prevail in a claim for compensatory damages under Title II of the Americans with Disability Act (ADA) *42 U.S.C. §12132*. This is clearly not born out by the record, because the court of appeals specifically affirmed the dismissal of the petitioners claim because they had failed to prove "intentional discrimination". As such, the matter was considered and ruled upon specifically by that lower court.

The petitioners in their brief to the court of appeals argued that they had presented a *prima facia* case of discrimination under the ADA presenting specific arguments explaining why petitioners had proven discriminatory conduct directed at them personally by the respondents. (Appellants 6th Cir. Brief, pgs. 32 - 54) At page 32 of their brief to the court of appeals, the petitioners specifically argued that the legal standard for discrimination by stating:

> "... a 'Public Entity' commits a 'discriminatory act' when a speech and hearing disabled person is excluded, denied services, segregated or otherwise treated differently than other individuals because of the absence or inadequacies of 'auxiliary aids'." Id. (Supporting citations omitted)

It is important to note that in their briefs to the Sixth Circuit, neither of the respondents objected to this standard, and neither specifically mentioned a requirement of proof of "intentional discrimination" or that the petitioners had failed to prove that type of discrimination. (Savannah Police Dept. 6th Cir. Brief, pg. 17; Hardin County 6th Cir. Brief, pg. 15). In their responsive brief, Savannah Police Department (Savannah) based its entire argument on the proposition that an arrest is not a service, program or activity under the ADA.[1] Hardin County based its

---

[1] Savannah suggests that the petitioners have failed to address an issue decided by the court of appeals that an arrest is not a program, service or activity of a public entity under the facts of this case. (Savannah Brief at pg. 14) It is important to note that the court of appeals assumed that the arrest fell within the parameters of Title II of the ADA for purposes of its decision and

defense entirely on a factual argument that the accommodations provided were "effective" in providing the same benefits as other persons that were serving time in the jail and that went to the Hardin County General Sessions Court. Id.

In rendering its decision, the Sixth Circuit raised the requirement of proof of "intentional discrimination" for the first time as a basis for sustaining the dismissal of petitioners claims. The court suggested that a plaintiff must show that:

> ". . . the "discrimination was intentionally directed toward him or her in particular. Acts and omissions which have a disparate impact on disabled persons in general [are] not specific acts of intentional discrimination against [the plaintiff] in particular." *Tucker v. Hardin County, et al.*, 509 F.3d 526, 532 (Apx. pg. 14a).[2]

---

resolved the case in favor of the respondent because it found that the petitioners had failed to prove their claim of "intentional discrimination". *Tucker*, 539 F.3d at 535 (Apx. pg. 20a - 21a). As such, that issue is not before the court.

[2] It is important to note that this is not a disparate impact case. All of the petitioners claims of discrimination involve actions that were specifically directed towards them or request for aids they personally made to the public entities that were denied or ignored. As such, the court of appeals decision is not based on a failure to prove intentional discrimination because the conduct was not directed at the petitioners personally. Instead the court has held that petitioners failed to prove intentional discrimination because they were proffered aids that the court felt were adequate or effective. Petitioners have vigorously argued that the aids were not adequate or effective throughout the proceedings of this case.

Thereafter, the opinion reviews the facts and concludes that there is no proof of "intentional discrimination" as to each event that the petitioners claim they were discriminated in because the proffered aids were "effective" in providing access to the respondents programs, services and activities. This was despite the fact that the matter was before the court on summary judgment where the evidence was to be looked at in the light most favorable to the petitioners, *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 249 (1986). The court of appeals determined that they would rest their decision on the "facts". *Tucker*, 539 F.3d at 539 (Apx. pg. 29a).

After the publication of the Sixth Circuit opinion, petitioners filed a "Petition for Rehearing or in the Alternative Hearing *En Banc*". Petitioners provided an extensive review of the facts and citations from numerous circuits presenting factual circumstances similar to petitioners claims. In each of those cited cases, the court of appeals required jury trials because there was a question of fact required to be resolved by a jury as to whether the proffered aids were adequate. Petitioners further argued that they had presented evidence to support that requirement and that the proffered accommodations were not effective. As such, no matter the adjective associated with discrimination under Title II of the ADA, petitioners argued and cited to authority supporting their claim that they had presented a *prima facia* case of discrimination under Title II of the ADA.[3] This is just as petitioners had

---

[3] In the original petition filed in this court, five different standards of discrimination are demonstrated as used by the various circuits throughout the country. It is the petitioners position that no

argued from the beginning of the law suit, and this is the specific issue that they are requesting this court to hear. The court of appeals applied an analysis that used the term "intentional" to describe "discrimination. As such, the matter was before the court and was a central tenant in dismissing petitioners claims.

III. Respondents Improperly Argue the Merits of Their Defense as Justification for Denying the Petition

(a) Respondents assertion that the circuit courts factual conclusion that the proffered accommodations were effective is the legal question that is presented by petitioners.

Under *Sup. Ct. R. 10(a)*, the significant criteria for this courts consideration of a petition is whether there is a conflict among the circuit courts, not whether the decision was a correct one. Both respondents present arguments that petitioners claims against them cannot be sustained because no reasonable jury could find that the communications during their contact were ineffective. (Savannah Brief in Opposition, pg. 14; Hardin County Brief in Opposition, pg. 10 - 12) As has been typical of respondent's approach through out this

---

matter the adjectives associated with the standard for discrimination, including the use of the term "intentional discrimination", they have actionable claims. For example, the petitioners repeatedly requested that they be provided a sign language interpreter throughout the various contacts with the respondents. They were never provided with one. This could certainly be considered to be an action directed at them personally and therefore an "intentional discrimination".

case, they wish to argue facts that must be looked at in the light most favorable to the petitioners. Hardin County even admits that the court of appeals conducted an independent *de novo* "factual" analysis and headlines that the Sixth Circuit did not rule that the effectiveness of the provided accommodations was a "question of law". (Hardin County Brief in Opposition to Petition, pg. 9) That then begs the legal question presented by petitioners to this court: "Is the adequacy of aids proffered by a public entity a jury question?".

A court reviewing motions for summary judgment can only make a final ruling if there are "no genuine issue as to any material fact and that movant is entitled to judgment as a matter of law." *Fed. R. Civ. P. 56(c).* The fact finding role when there is a dispute as to the facts of a case is the responsibility of a jury. On motions for summary judgment, the court must look at the evidence in the light most favorable to the petitioners. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 249 (1986) Hardin County asserts and is supported by the court of appeals decision that the communication by respondents agents were effective because communications were "achieved".[4] (Hardin

---

[4] The ADA imposes on a public entity a duty of more than just achieving communications. It requires that the communications be adequate to enable the disabled person to participate in the program, service or activity to the same extent as a non-disabled person. *42 U.S.C. §12132; 28 C.F.R. §35.130(b)(iii); 28 C.F.R. §35.160.* It is important to note that the basis for the factual conclusion that the communications were effective was the testimony of the non-disabled participants in the various contacts that the petitioners had with the respondents. The failure to give credence to the testimony of the hearing and speech disabled

County Reply to Petition for Cert., pg. 9) As presented in the petition, Blake and Otis Tucker testified that for them, the proffered aids were not effective and communications were not achieved in a non-discriminatory manner. (Petition for Cert., pgs 5 - 14) Savannah asserts that their proffered accommodations of lip reading and pencil and paper were effective because the communications did not disrupt the police officers mission. (Savanna Reply to Petition for Cert., pg. 15).

Neither respondent provides any argument as to why this court should not consider whether a finding of "effectiveness" or technically the "adequacy of the proffered aid" is a legal one that should be done by judges as held by the court of appeals or a factual one that should be considered by a jury as held by the Third, Eighth, and Ninth Circuits. See, *Chisolm v. McManimon*, 275 F.3d 315, 327-328 (3d Cir. 2001); *Randolph v. Rodgers*, 170 F.3d 850, 859 (8th Cir. 1999); *Duffy v. Riveland*, 98 F.3d 447, 454, 455 (9th Cir. 1996). Certainly, the conflicts in the circuits as to this question, as specifically delineated in the petition, amply support the conclusion that this matter should be considered by this court.

---

petitioners they did not understood what was being communicated compounds the discrimination that the ADA was supposed to eliminate.

(b) The circuits are in serious conflict as to the legal issues before the court in this case.

Hardin County argues that all of the circuit conflicts presented in the Tuckers petition associated with the question of what constitutes a *prima facia* case of discrimination are in reality not in conflict. (Hardin County Brief in Opposition to Petition for Cert., pg. 7 - 9) It asserts that the fundamental question in all of the cases is whether the alleged failure to accommodate caused a fundamental difference in the aid, benefit, or service compared with what a non-disabled individual receives. (Id at pg. 7). Simply speaking, Hardin County has gone full circle back to the issue of the adequacy or effectiveness of the proffered aid. As such, it appears to present an argument that the issue as to whether discrimination has been perpetrated against a disabled person is not one of "intentional discrimination", but instead is resolved by the determination of the adequacy of the aid proffered by the respondent. In light of the demonstrated conflict in the circuits as to whether the effectiveness of a proffered aid is a factual decision to be determined by a jury or a legal one to be decided by the court, it clearly supports the necessity of this court granting the petition to resolve that conflict.

CONCLUSION

The respondents have failed to provide any proper basis for not granting the petition in this case. As such, the petition should be granted.

Respectfully submitted,
Odis Tucker, Blake Tucker and Vonnie Tucker, Petitioners

By: William J. Brown (Tenn. BPR# 5450)
Counsel of Record
William J. Brown & Associates
23 N. Ocoee, P.O. Box 1001
Cleveland, TN 37364-1001
Ph: (423) 476-4515

Counsel for Petitioners

July 13, 2009